



167.3 and 167.85. In accordance with 40 CFR § 167.85(d), the report is to be submitted on or before March 1 of each year, reporting pesticide production in the preceding calendar year. It was proposed to assess Hawk Creek a penalty of \$4,000, allegedly calculated in accordance with the "Enforcement Response Policy for the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)," dated July 2, 1990, and the Enforcement Response Policy for FIFRA Section 7(c) Pesticide Producing Establishments Reporting Requirements," dated February 10, 1986.

Hawk Creek responded to the complaint by letter, dated July 29, 1991, signed by Frank N. Lecrone, Jr., President. The letter stated that "Hawk Creek has not produced any Proteam Supreme since July of 1989. Consequently, when the EPA Form 3540-16 was received, it was placed in our Proteam Supreme file, which was and is inactive. Also, it was our understanding, since we were no longer producing Proteam Supreme that Proteam production reporting was covered by the Connecticut and Florida production facilities."<sup>2/</sup> The letter further stated that Hawk Creek is a

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<sup>2/</sup> By a letter, addressed to the ALJ, dated January 22, 1992, on letterhead entitled "Proteam Products," the John Girvan Company, Inc., Jacksonville, Florida, forwarded a copy of the 1990 pesticides report submitted by it and a copy of a portion of the 1990 report submitted by Phoenix Chemical of Bethel, Connecticut. The relationship, if any, between these firms and Hawk Creek does not appear in the record.

small business and the proposed penalty would be devastating--especially considering that the violation was merely an administrative error. Respondent asked for a reconsideration of the complaint, and requested a settlement conference.<sup>3/</sup> The letter indicated that an enclosure was EPA Form 3540-16, 1990 "No Production Report."

The parties have filed pre-hearing exchanges in accordance with an order of the ALJ. Under date of November 25, 1992, Complainant filed a Motion For Accelerated Decision pursuant to 40 CFR § 22.20 and a memorandum in support thereof (motion). The motion alleged (1) that Hawk Creek was an EPA registered pesticide producer in 1990; (2) that Hawk Creek failed to file an annual pesticide report and (3) that the proposed penalty was appropriate. Accordingly, Complainant requested issuance of an accelerated decision finding Hawk Creek in violation of FIFRA and assessing a penalty of \$4,000.

In support of (1) above, the motion pointed out that the complaint alleged Hawk Creek was a pesticide producing establishment during 1990 and that Hawk Creek had not denied that allegation in its answer. Complainant also pointed out that Hawk Creek's answer stated "(w)e had produced this product [Proteam Supreme] for about a year and a half, 1988 and part of 1989."

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<sup>3/</sup> This letter was interpreted as a request for a hearing and forwarded to the Chief ALJ for assignment of an ALJ, pursuant to 40 CFR § 22.21.

Moreover, Hawk Creek's pre-hearing exchange, dated December 5, 1991, states that "(w)e were given our EPA Establishment No. by phone on 11/6/87 by R. Lucas, EPA, Philadelphia." Complainant asserts that Hawk Creek submitted pesticide production reports for 1987, 1988 and 1989 and had not requested cancellation of its establishment registration or inactive status prior to filing of the complaint. For these assertions, Complainant relies in part on the declaration of Martha Donado, the EPA, Region III employee currently responsible for the compilation and maintenance of records as to compliance with FIFRA § 7(c)(1). Accordingly, citing 40 CFR § 167.20(f),<sup>4/</sup> Complainant says Hawk Creek's establishment registration was in effect during the calendar year 1990.

As support for the allegation that Hawk Creek had not filed an annual pesticide report for 1990 prior to the filing of the complaint on July 22, 1991, Complainant relies on the admissions in Hawk Creek's answer, the fact that it enclosed the 1990 report indicating "no production" with its answer and upon the declaration of Martha Donado, referred to above.

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<sup>4/</sup> Section 167.20(f) provides:

(f) Duration of registration. Establishment registration will remain effective provided pesticide reports are submitted annually pursuant to the requirements of this part. Failure to submit a report may result in termination of establishment registration, civil and/or criminal penalty assessments.

Arguing that the proposed penalty is appropriate, Complainant points out that the purpose of the report requirement is to further the effective regulation of pesticides. Complainant alleges that the proposed penalty was determined in accordance with the Guidelines for the Assessment of Civil Penalties (1974), the Interim Schedule (April 22, 1975) and the 1990 FIFRA Enforcement Response Policy, that the size of Hawk Creek in terms of sales was taken from a Dun & Bradstreet report, dated June 11, 1991,<sup>5/</sup> that Hawk Creek has not supported its contention that imposition of the proposed penalty would adversely impact its ability to continue in business and that recordkeeping and reporting violations do not lend themselves to gravity adjustments. Complainant also notes that Hawk Creek has consistently been delinquent in filing annual production reports. For these reasons, Complainant maintains that the proposed penalty of \$4,000 is proper and should be assessed against Hawk Creek.

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<sup>5/</sup> The Dun & Bradstreet Report indicates that Hawk Creek's sales were \$519,000 in fiscal 1988, \$562,000 in fiscal 1989, and \$620,000 in fiscal 1990.

Hawk Creek's Response

On December 2, 1992, Hawk Creek responded to the motion, citing the definition of "establishment" in 40 CFR § 167.3<sup>6/</sup> and "who must report" in § 167.85(a).<sup>7/</sup> Hawk Creek asserted that it has not been an "establishment" or "producer" since July 1989 and therefore was not required to submit a 1990 production report. In a supplemental response, letter dated January 21, 1992, Hawk Creek enclosed a copy of EPA's Instructions For Completing: "Pesticides Report For Pesticide-Producing Establishments EPA Form 3540-16 (Revised 10-91)." Hawk Creek highlighted the paragraph entitled

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<sup>6/</sup> 40 CFR § 167.3 "Definitions" provides:

Establishment means any site where a pesticidal product, active ingredient, or device is produced, regardless of whether such site is independently owned or operated, and regardless of whether such site is domestic and producing a pesticidal product for export only, or whether the site is foreign and producing any pesticidal product for import into the United States.

<sup>7/</sup> 40 CFR § 167.85(a) "Reporting Requirements" provides:

(a) Who must report. Each producer operating an establishment must submit the reports required by this section concerning any pesticide, active ingredient, or device produced at each establishment. Custom blenders are not required to report production to the Agency.

"Warning to Producing Establishments"<sup>8/</sup> and asserted that "(s)ince we had stopped producing the registered product, Proteam Supreme, the paragraph would lead one to reason that an annual pesticide report was not necessary." The letter recommended that the heading read "Warning to Registered Establishments," so that non-producing firms such as Hawk Creek would not be mislead.

### D I S C U S S I O N

The operative language of Section 7(c)(1) of FIFRA (supra note 1) is that "(a)ny producer operating an establishment registered under this section shall inform the Administrator within 30 days after it is registered of the types and amounts of pesticides. . . (A) which the producer is currently producing; (B) which the producer has produced during the past year; and (C) which the producer has sold or distributed during the past year." (emphasis added). This information is required to be kept current and submitted annually under such regulations as the Administrator may prescribe.

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<sup>8/</sup> This paragraph provides:

Warning to Producing Establishments: Failure to file the initial and annual pesticide production report is an unlawful act and will result in the termination of registration of the establishment and in possible penalties as provided for in the Statute. It is unlawful to knowingly falsify all or part of any pesticide production information reported on EPA Form 3540-16. [Section 12(a)(2)(M), 7 U.S.C. Section 136j]

The quoted language makes it clear that it is the act of "operating an establishment registered under this section" rather than pesticide production which triggers the requirement for a report. This conclusion is strengthened by subparagraph (C) above which specifies that information submitted to the Administrator shall include pesticides "which the producer has sold or distributed during the past year." Accordingly, allowing the question of whether a pesticides report was required to be submitted to turn on whether pesticides were produced would not necessarily provide the information which the statute requires be furnished.

The foregoing analysis is supported by the regulation, presently 40 CFR § 167.85(d), which was amended in 1988 (53 Fed. Reg. 35056, September 8, 1988), effective August 9, 1989 (54 Fed. Reg. 32638), to expressly require submission of an annual report, even if the producer has produced no pesticidal product for the reporting year.<sup>2/</sup> Indeed, the very form quoted by Hawk Creek provides under "Items to be completed" that "A REPORT MUST BE FILED

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<sup>2/</sup> The regulation 40 CFR § 167.85(d) provides:

(d) When to report. A producer operating an establishment must submit an initial report no later than 30 days after the first registration of each establishment the producer operates. Thereafter, the producer must submit an annual report on or before March 1 of each year, even if the producer has produced no pesticidal product for that reporting year.



EVEN IF THERE HAS BEEN NO PRODUCTION. If the establishment has no production, enter "NO PRODUCTION" in Item 19."<sup>10/</sup>

While it is true that the definition of "establishment" (note 6 supra), read in isolation, might lead one to conclude that active production was a requirement therefor, the operative requirement of the statute (supra note 1), as we have seen, is not production but establishment registration. It is also true that the definition of "producer" as any person, as defined by the Act, who produces any pesticide,<sup>11/</sup> would, standing alone, support the conclusion that actual pesticide production was a requirement for producer status. The definition of producer may not be read apart from the

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<sup>10/</sup> In X-Chem, Inc., Docket No. I.F. & R.-VI-523C (Order Granting Motion For An Accelerated Decision, September 20, 1990) it was held that 40 CFR § 167.5(a) (1988) requiring that the pesticides report include, inter alia, the past year's amount of production and sales and distribution of each product, fairly construed, required submittal of a report irrespective of whether any pesticides were actually produced. This conclusion was based on the regulatory definition of "amount of pesticide" as meaning "quantity" and the fact that "quantity" could be a zero sum as well as any other number. Information required to be included in the report is presently specified in 40 CFR § 167.85(b) and the definition of "amount of pesticidal product" as meaning "quantity" is contained in § 167.3.

<sup>11/</sup> The regulation, 40 CFR § 167.3, defines producer as follows:

Producer means any person, as defined by the Act, who produces any pesticide, active ingredient, or device (including packaging, repackaging, labeling and relabeling).

regulation in which it is contained, however, and the requirement of 40 CFR § 167.85(a) that "(e)ach producer operating an establishment must submit the reports required by this section. . ." (emphasis added) (supra note 7), together with Section 167.85(d) which requires the submission of a report by March 1 of each year, even if no pesticidal product has been produced for that reporting year (supra note 9), lead to the conclusion that under the regulation, no less than under the statute, the controlling fact as to whether a report is required is the operation of a registered establishment. This reading of the regulation is supported by Section 167.20(f) which provides that establishment registration will remain in effect provided pesticide reports are submitted annually pursuant to the requirements of this section (supra note 4). Moreover, current Agency instructions for completing the "Pesticides Report For Pesticide-Producing Establishments," EPA Form 3540-16, clearly require submission of a report, even if there has been no pesticide production. Similar Agency instructions dating back to 1978 are of the same effect (see X-Chem, supra note 10).

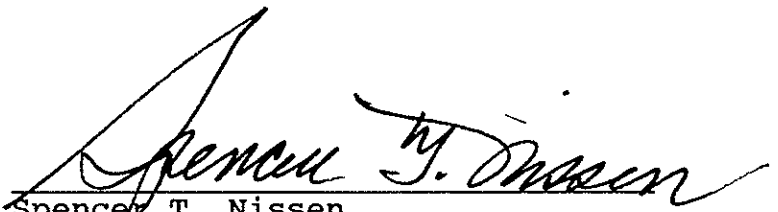
In view of the foregoing, Hawk Creek was required to submit an annual pesticides report for the calendar year 1990 on or before March 1, 1991, and is liable for a civil penalty pursuant to Section 14(a) of FIFRA for failing to do so.

Determining the amount of a penalty on a motion for accelerated decision, no less than determining damages on summary judgment, is, however, seldom, if ever, appropriate. See, e.g., The Monte Vista Cooperative, Docket No. I. F. & R.-VIII-91-296C (Order, June 10, 1992). This is especially true where the amount of a penalty is contested in part on the ground of its effect on the respondent's ability to continue in business. Accordingly, Complainant's motion insofar as it seeks imposition of a penalty will be denied.

O R D E R

Complainant's motion for an accelerated decision insofar as it seeks a finding that Hawk Creek violated the Act by failing to timely file a pesticide report for the calendar year 1990 is granted. The motion insofar as it seeks assessment of a penalty is denied. The amount of the penalty remains at issue and will be determined, after further proceedings, including a hearing, if necessary.

Dated this 13<sup>th</sup> day of July 1993.

  
Spencer T. Nissen  
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the original of this ORDER GRANTING IN PART MOTION FOR ACCELERATED DECISION, dated July 13, 1993, in re: Hawk Creek Laboratory, Inc., Dkt. No. IF&R-III-435-C, was mailed to the Regional Hearing Clerk, Reg. III, and a copy was mailed to Respondent and Complainant (see list of addressees).



Helen F. Handon  
Legal Staff Assistant

DATE: July 13, 1993

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